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PNL Capital Sdn Bhd & Ors v Loh Teck Wah & Ors

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COURT OF APPEAL (PUTRAJAYA) — APPEAL NOS W-02(IM)-1229–06 OF 2021, W-02(A)-1230–06 OF 2021, W-02(IM)-1231–06 OF 2021 AND W-02(A)-1232–06 OF 2021
YAACOB MD SAM, LEE SWEE SENG AND GUNALAN MUNIANDY JJCA
3 OCTOBER 2022

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Companies and Corporations — Judicial management ('JM') — Whether JM mechanism was abused to achieve collateral purpose — Minority shareholder/director in Group of companies ('group') funded start-up of Fintree to rival group's business — Minority shareholder's nominee became sole shareholder/director in Fintree and key staff from group joined Fintree — Group sued Fintree and its director for stealing group's confidential information for Fintree's use and injuring group's business in the process — Fintree and director entered into consent judgment to settle suit and admit to Group's several allegations against them — Group's minority shareholder successfully applied ex parte to High Court to place Fintree under JM thus rendering consent judgment invalid under s 410(c) Companies Act 2016 and stripping nominee director of his powers over Fintree — Whether JM mechanism was misused by group minority shareholder to get rid of nominee director, take control of Fintree and ensure it continued to rival group's business — Whether High Court should have considered in-depth why JM for Fintree was being applied for ex parte when company was not unable to pay its debts and did not need to be saved from winding-up — Companies Act 2016 ss 404 & 405(1)

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The five appellant companies in Appeal Nos 1229 and 1230 herein formed the 'PNL Group of Companies' ('the group') in which the first respondent ('Loh') was the minority shareholder and director. The appellant in Appeal Nos 1231 and 1232 ('Liew') was the senior-most employee in the group in charge of its finance and entire operations before he resigned to become the sole shareholder-cum-director in the second respondent ('Fintree') whose incorporation and start-up capital was funded by Loh for the purpose of going into the business of providing financial and management consultancy services — the same business the first and second appellants in Appeal No 1229 were engaged in. Following Liew's resignation, the group carried out an IT forensic investigation on the company laptops that Liew had used before he left the group and found that confidential information belonging to the group had been downloaded from the group's office servers to Liew's personal cloud storage and applications had been used to 'cover up the tracks'. It was also discovered that certain key staff of the aforesaid first and second appellants had

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A resigned one after the other in close succession to join Fintree. The group sued Liew and Fintree (in 'Suit 623') for, inter alia, misappropriating the group's confidential information, data and records and converting them for their own use, benefit and profit and for conspiring to injure the group's business. The group obtained an Anton Piller order ('APO') to raid Fintree's premises where B more confidential documents belonging to the group were discovered as well as evidence of collusion between Liew and Loh with regard to the aforesaid resignations of key staff from the group to join Fintree. In view of the evidence unearthed by the raid, Liew and Fintree decided to settle Suit 623 and recorded a consent judgment with the group. The consent judgment, inter alia, C prevented Fintree from accessing and using the confidential information of the group and its clients and also required Fintree to hand over all its files, computers and/or servers to the group for inspection and provide a list of persons to whom Fintree had disclosed the said confidential information. The consent judgment, however, could not be perfected because the day before it D was recorded, Loh, claiming to be Fintree's creditor and alleging that the company was unable to pay its debts, successfully applied ex parte to the High Court under ss 404 and 405(1) of the Companies Act 2016 ('the CA') to place Fintree under judicial management with the appointment of a judicial manager ('JM'). This action not only immediately disabled Liew from E exercising any further control over Fintree but rendered the court's recording of the consent judgment (which was eventually set aside) invalid under s 410(c) of the CA because it was recorded after the judicial management application was filed. The instant appeals by the group and Liew were against the High Court's dismissal of their respective applications to set aside/strike out Loh's ex parte F applications for the judicial management order and appointment of JM. The third respondent in the appeals herein, Kang Mooi Chin ('Vanessa') was an ex-independent contractor of the one of the companies in the group who joined Fintree to continue to perform her former role of introducing clients and securing business for financial and management consultancy work. She G was the only one who supported Loh's application as a contingent creditor claiming that Fintree owed her RM2,945,118.53 in unpaid commissions for work she had secured for the company. In the instant appeal, the group and Liew argued that Loh's action in appointing a JM aligned to him was mala fide, an abuse of the judicial management mechanism to achieve an ulterior purpose H of taking control of Fintree, disabling Liew's control of the company and thwarting the compromise Liew and Fintree had reached with the group. The group argued that, in reality, Loh was the shadow director in Fintree which he had set up to compete with the group following his disagreements with the group's majority shareholders and that Liew was merely Loh's nominee/proxy I in Fintree.

Held, unanimously allowing the appeals and setting aside the judicial management order, the appointment of the JM and all decisions that were made by the JM:

(1) For a judicial management order ('JMO') to be made, the first requirement under s 405(1)(a) of the Companies Act 2016 was for the court to be satisfied that the company in question was or would be unable to pay its debts. If that requirement was not met, the inquiry of the court ended there and no JMO would be made and the application for judicial management would be dismissed (see paras 76 & 97).

(2) In the instant case, Fintree was not unable to pay its debts and there was no fear of its insolvency. Apart from Loh and Vanessa, no creditors had made any complaints or demands upon Fintree. The evidence provided by Loh to prove Fintree's 'insolvency' was neither accurate nor reliable. The two reports prepared by the interim judicial manager only considered the contingent liabilities of Fintree without correspondingly taking into consideration the contingent assets. If Vanessa's claim was true, that she would receive 50% of the fees charged to clients referred by her to Fintree, and that Fintree owed her RM2,945,118.53 in unpaid commissions, then about RM6m in fees was recoverable by Fintree from those clients which would be more than enough to pay off all the creditors, including Loh, and leave a surplus. Both Loh and Vanessa had more than a casual creditor's interest in recovering their debts; they had an eye on the bigger battle of a shareholders' dispute that was being fought on various fronts. Loh's and Vanessa's concerns were not that of a pure and plain creditor but rather that of persons who had a personal and peculiar interest in the continuing success of Fintree (see paras 77–78, 90, 92, 111, 159 & 169).

(3) Loh's concern was not about recovering his loan from Fintree. His prime motivation was to disable Liew from controlling Fintree so that he would not be able to do further harm in Loh's personal battle with the majority shareholders in the PNL Group. Liew was no longer heeding Loh's instructions and 'damage control' had to be put in place and none faster than to convince the court of an urgent need to have an interim judicial manager appointed for Fintree. Taking control of Fintree was Loh's strategy to fight the PNL majority shareholders because Liew seemed to be admitting to the accusations and claims of breach of fiduciary duties, breach of confidential information and conspiracy to injure the business of the PNL Group, much to Loh's annoyance (see paras 70 & 143–144).

(4) The High Court judge erred in exercising his discretion to appoint a JM for Fintree when the circumstances did not justify it, more so when the applicant Loh had an overriding interest which was more than that of a mere creditor. Given the serious allegations that the respective parties were making against each other, the High Court should have ascertained if the application for appointment of a JM was bona fide and not a tool

to further Loh's pecuniary and personal interest in Fintree and to wrest control of it from Liew by 'booting' him out with the appointment of a JM (see paras 47 & 172).

(5) Section 405 of the CA was enacted to revive an insolvent company and allow a professional manager to design a scheme for its revival. It should not be hijacked for a different purpose and abused by anyone to advance their own personal interest in the target company or to fight a shareholders' battle (see paras 54, 141 & 170).

(6) Loh was asking for the court's assistance to protect his interest as a creditor when his real intention went far deeper in that he was trying to wrest control of Fintree in a shareholders' dispute arising out of his disputes with the majority shareholders in the PNL Group. It came to this court's notice that Loh had later filed a separate application in the High Court for a declaration that he was the beneficial owner of all the shares in Fintree and for an order that Liew transfer to him all the shares in Fintree. Loh did not disclose this when he applied for the order to appoint the JM. What became obvious from this was that Loh was himself the alter ego of Fintree, its shadow director and its sole shareholder in reality and it reeked of mala fide for him to seek the court's help to appoint a JM to help him recover from himself what was owing to him (see paras 146–149).

[Bahasa Malaysia summary

Lima syarikat perayu dalam Rayuan No 1229 dan 1230 telah menubuhkan 'Kumpulan Syarikat PNL' ('kumpulan syarikat') di mana responden pertama ('Loh') adalah pemegang saham minoriti dan pengarah. Perayu dalam Rayuan No 1231 dan 1232 ('Liew') adalah pekerja paling kanan dalam kumpulan syarikat yang bertanggungjawab ke atas kewangan dan keseluruhan operasinya sebelum beliau meletak jawatan untuk menjadi pemegang saham utama dan pengarah dalam responden kedua ('Fintree') yang mana penggabungan dan modal permulaan dibiayai oleh Loh untuk perkhidmatan perundingan kewangan dan pengurusan — perniagaan yang sama perayu pertama dan kedua dalam Rayuan No 1229 terlibat. Selepas peletakan jawatan Liew, kumpulan syarikat tersebut menjalankan siasatan forensik IT ke atas komputer riba syarikat yang telah digunakan Liew sebelum beliau meninggalkan kumpulan syarikat tersebut dan mendapati bahawa maklumat sulit milik Kumpulan telah dimuat turun dari server pejabat kumpulan syarikat ke penyimpanan awan peribadi Liew dan aplikasi telah digunakan untuk 'menutup jejak'. Juga didapati bahawa beberapa pekerja utama perayu pertama dan kedua yang disebutkan di atas telah meletak jawatan berturut-turut untuk menyertai Fintree. Kumpulan syarikat menyaman Liew dan Fintree (dalam 'Saman 623') kerana, antara lain, menyalahgunakan maklumat sulit, data dan rekod Kumpulan dan menukarnya untuk kegunaan, faedah dan keuntungan mereka sendiri dan berkomplot untuk menjejaskan perniagaan kumpulan

syarikat tersebut. kumpulan syarikat tersebut telah memperoleh perintah Anton Piller ('APO') untuk memasuki premis Fintree di mana lebih banyak dokumen sulit milik kumpulan syarikat tersebut ditemui serta keterangan muktamad antara Liew dan Loh berhubung peletakan jawatan kakitangan utama kumpulan untuk menyertai Fintree. Memandangkan keterangan yang dikemukakan oleh penyiasatan tersebut, Liew dan Fintree memutuskan untuk menyelesaikan Saman 623 dan merekodkan penghakiman persetujuan dengan kumpulan syarikat tersebut. Penghakiman persetujuan tersebut, antara lain, menghalang Fintree daripada mengakses dan menggunakan maklumat sulit kumpulan syarikat dan pelanggannya dan juga menghendaki Fintree menyerahkan semua fail, komputer dan/atau servernya kepada kumpulan syarikat untuk pemeriksaan dan menyediakan senarai orang yang Fintree telah mendedahkan maklumat sulit tersebut. Bagaimanapun, penghakiman persetujuan tersebut tidak dapat disempurnakan kerana sehari sebelum ianya direkodkan, Loh, mendakwa dirinya sebagai pemiutang Fintree dan menyatakan bahawa syarikat tersebut tidak dapat membayar hutangnya, lalu berjaya memohon ex parte kepada Mahkamah Tinggi di bawah ss 404 dan 405(1) Akta Syarikat 2016 ('AS') untuk meletakkan Fintree di bawah pengurusan kehakiman dengan pelantikan pengurus kehakiman ('JM'). Tindakan ini bukan sahaja menghalang Liew daripada menjalankan sebarang kawalan lanjut ke atas Fintree tetapi juga menyebabkan Mahkamah tidak sah dalam merekodkan penghakiman persetujuan (yang akhirnya diketepikan) di bawah s 410 (c) AS kerana ianya direkodkan selepas permohonan pengurusan kehakiman difailkan. Rayuan ini oleh Kumpulan dan Liew adalah terhadap keputusan Mahkamah Tinggi menolak permohonan masing-masing untuk mengenepikan/membatalkan permohonan ex parte Loh bagi perintah pengurusan kehakiman dan pelantikan JM. Responden ketiga dalam rayuan di sini, Kang Mooi Chin ('Vanessa') adalah bekas kontraktor bebas dalam salah satu syarikat dalam kumpulan syarikat yang menyertai Fintree untuk terus melaksanakan peranannya memperkenalkan pelanggan dan mendapatkan perniagaan untuk kerja-kerja perundingan kewangan dan pengurusan. Beliau merupakan satu-satunya yang menyokong permohonan Loh sebagai pemiutang kontinjen yang menyatakan Fintree berhutang sebanyak RM2,945,118.53 dalam komisen yang tidak dibayar untuk kerja yang diperolehnya untuk syarikat tersebut. Dalam rayuan ini, kumpulan syarikat dan Liew berhujah bahawa tindakan Loh dalam melantik JM yang sejajar dengannya adalah mala fide, penyalahgunaan proses pengurusan kehakiman untuk mencapai tujuan tersembunyi untuk mengawal Fintree, melumpuhkan kawalan Liew terhadap syarikat tersebut dan menggagalkan tindakan Liew untuk urusan antara kumpulan syarikat dan Fintree. Kumpulan syarikat berhujah bahawa Loh adalah pengarah bayangan di Fintree yang ditubuhkannya untuk bersaing dengan kumpulan syarikat berikutan ketidaksetujuannya dengan pemegang saham majoriti kumpulan dan bahawa Liew hanyalah calon/proksi Loh di Fintree.

Diputuskan, sebulat suara membenarkan rayuan-rayuan dan menolak perintah pengurusan kehakiman, perlantikan JM dan segala keputusan yang dibuat oleh JM:

(1) Untuk perintah pengurusan kehakiman ('JMO'), syarat pertama di bawah s 405(1)(a) Akta Syarikat 2016 adalah untuk mahkamah berpuas hati bahawa syarikat berkenaan adalah atau tidak dapat membayar hutangnya. Sekiranya keperluan tersebut tidak dipenuhi, penelitian mahkamah berakhir di sana dan tiada JMO akan dibuat dan permohonan untuk pengurusan kehakiman sepatutnya ditolak (lihat perenggan 76 & 97).

(2) Di dalam kes ini, Fintree tidak dapat membayar hutangnya dan tiada kebimbangan terhadap ketidakmampuan pembayarannya. Selain Loh dan Vanessa, tiada pemiutang yang membuat sebarang tuntutan terhadap Fintree. Keterangan yang diberikan oleh Loh untuk membuktikan 'insolvensi' Fintree tidak tepat atau boleh dipercayai. Kedua-dua laporan yang disediakan oleh pengurus kehakiman sementara hanya mempertimbangkan liabiliti kontinjen Fintree tanpa mengambil kira aset kontinjen. Sekiranya dakwaan Vanessa tersebut benar, bahawa dia akan menerima 50% daripada yuran yang dikenakan kepada pelanggan yang dirujuk olehnya kepada Fintree, dan Fintree berhutang RM2,945,118.53 dalam komisen yang tidak dibayar, maka kira-kira RM6 juta bayaran boleh diperolehi semula oleh Fintree daripada pelanggan tersebut yang mana akan lebih dari cukup untuk membayar semua pemiutang, termasuk Loh, dan tinggalkan lebihan. Kedua-dua Loh dan Vanessa mempunyai lebih daripada kepentingan pemiutang berkaitan untuk memperoleh hutang mereka; mereka mengambil peluang dari pertikaian pemegang saham yang sedang berlaku. Kebimbangan Loh dan Vanessa bukanlah atas dasar pemiutang biasa tetapi lebih kepada orang yang mempunyai minat peribadi dalam kejayaan berterusan Fintree (lihat perenggan 77–78, 90, 92, 111, 159 & 169).

(3) Kebimbangan Loh bukanlah untuk mendapatkan semula pinjamannya daripada Fintree. Tujuan utamanya adalah untuk melumpuhkan Liew daripada mengawal Fintree supaya beliau tidak dapat melakukan sebarang tindakan lagi untuk pertikaian peribadi Loh dengan pemegang saham majoriti dalam Kumpulan PNL. Liew tidak lagi mematuhi arahan Loh dan 'kawalan kerosakan' perlu dilaksanakan dan cuba untuk meyakinkan mahkamah tentang keperluan mendesak untuk melantik pengurus kehakiman sementara untuk Fintree. Mengambil alih Fintree adalah strategi Loh untuk melawan pemegang saham majoriti PNL kerana Liew seolah-olah mengakui tuduhan dan dakwaan pelanggaran tugas fidusiari, pelanggaran maklumat sulit dan konspirasi untuk

menjejaskan perniagaan Kumpulan PNL, lebih untuk menyusahkan Loh (lihat perenggan 70 & 143–144).

(4) Hakim Mahkamah Tinggi terkhilaf dalam menggunakan budi bicaranya untuk melantik JM untuk Fintree apabila keadaan tersebut tidak membenarkannya, apatah lagi apabila pemohon Loh mempunyai kepentingan berlebihan yang lebih daripada pemiutang semata-mata. Memandangkan dakwaan serius yang dibuat oleh pihak masing-masing terhadap satu sama lain, Mahkamah Tinggi sepatutnya menentukan sama ada permohonan pelantikan JM adalah bona fide dan bukannya alat untuk melanjutkan kepentingan kewangan dan peribadi Loh terhadao Fintree dan untuk memperoleh kembali kawalannya daripada Liew dengan menyingkirkannya dengan pelantikan JM (lihat perenggan 47 & 172).

(5) Seksyen 405 AS telah digubal untuk memulihkan syarikat yang tidak solven dan membenarkan pengurus profesional merancang pemulihannya. Ianya tidak boleh digunakan untuk tujuan yang berbeza dan disalahgunakan oleh sesiapa sahaja untuk kepentingan peribadi mereka sendiri dalam syarikat tertentu atau untuk menentang pemegang saham (lihat perenggan 54, 141 & 170).

(6) Loh bertujuan untuk meminta bantuan mahkamah untuk melindungi kepentingannya sebagai pemiutang apabila niat sebenar beliau sebenarnya untuk merampas kawalan Fintree dalam pertikaian pemegang-pemegang saham antaranya dengan pemegang saham majoriti dalam Kumpulan PNL. Mahkamah ini juga mendapati bahawa Loh kemudiannya memfailkan permohonan berasingan di Mahkamah Tinggi untuk perisytiharan bahawa dia adalah pemilik utama semua saham dalam Fintree dan untuk perintah bahawa Liew memperoleh semua saham dalam Fintree. Loh bagaimanapun tidak mendedahkan perkara tersebut ketika memohon perintah perlantikan JM. Adalah bahawa Loh sendiri adalah alter ego Fintree, pengarah bayangannya dan pemegang saham utamannya secara realiti dan bertindak mala fide untuk dia mendapatkan bantuan mahkamah untuk melantik JM untuk mengelakkan perkara yang dipertanggungjawabkannya (lihat perenggan 146–149).]

Cases referred to

AA Mutual International Insurance Co Ltd, Re [2004] EWHC 2430 (Ch), ChD (refd)

Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Sdn Bhd [1997] 5 MLJ 377, HC (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd & Other Appeals [2008] 2 MLJ 622; [2008] 2 CLJ 121, FC (refd)

Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit [2019] 8

MLJ 473; [2018] 10 CLJ 412, HC (refd)
Loh Teck Wah v Fintree Capital Sdn Bhd (PNL Capital Sdn Bhd & Ors, interveners) [2022] 11 MLJ 464; [2021] 1 LNS 782, HC (refd)
KS Energy Ltd and another, Re [2020] SGHC 198, HC (refd)
Mansion Properties Sdn Bhd v Sham Chin Yen & Ors [2021] 1 MLJ 527, FC (refd)
Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd) [2022] 7 MLJ 76; [2020] 1 LNS 1617, HC (refd)
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ 313, SC (refd)

Legislation referred to

Companies Act 2016 ss 346, 404, 405, 405(1), (1)(a), (1)(b), (1)(b)(iii), (4), (8), 410, 410(c), 466, 466(1)(a), 466(1)(c)
Companies (Corporate Rescue Mechanism) Rules 2018 r 30
Rules of Court 2012 O 15 r 6
Rules of the High Court 1980 (repealed by Rules of Court 2012) O 15 r 6

Appeal from: *Loh Teck Wah v Fintree Capital Sdn Bhd (PNL Capital Sdn Bhd & Ors, interveners)* [2022] 11 MLJ 464 (High Court, Kuala Lumpur)

Yap Boon Hau (with Christina Lau Zhi Yan and Fang Kai Loon) (Mah-Kamariyah & Philip Koh) in Appeal Nos W-02(A)-1229–06 of 2021 and W-02(A)-1230–06 of 2021 for the appellants.
Brendan Navin Siva (with Aida Haryani bt Salamon) (Brendan Siva) in Appeal Nos W-02(A)-1231–06 of 2021 and W-02(A)-1232–06 of 2021 for the appellants.
Shim De Szen (with Hazwan Lee bin Haris Lee and Tay Shieh Chin) (Yeoh Shim Siow & Lay Kuan) in Appeal Nos W-02(A)-1229–06 of 2021, W-02(A)-1230–06 of 2021, W-02(A)-1231–06 of 2021 and W-02(A)-1232–06 of 2021 for the first respondent.
Himahlini Ramalingam (with Fon Ren Ming) (Himahlini & Co) in Appeal Nos W-02(A)-1229–06 of 2021, W-02(A)-1230–06 of 2021, W-02(A)-1231–06 of 2021 and W-02(A)-1232–06 of 2021 for the second respondent.
Gopi Seshadari (with Chong Hau Yean) (Gopi Seshadari) in Appeal Nos W-02(A)-1229–06 of 2021, W-02(A)-1230–06 of 2021, W-02(A)-1231–06 of 2021 and W-02(A)-1232–06 of 2021 for the third respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] The issue before us is whether the applicant in the High Court below for his application for the appointment of an interim judicial management ('IJM') order against the target company had been made mala fide and was an abuse of process and whether the High Court had taken into consideration all the relevant factors set out in ss 404 and 405 of the Companies Act 2016 ('the CA

2016') before granting the IJM order and subsequently the judicial management order ('JMO'). A

[2] At the time of the ex parte application by way of an originating summons ('OS'), the protagonists were involved in a shareholders' dispute and there was pending a suit filed by companies under the control of the other faction of shareholders to obtain an Anton Piller order against the target company and its sole shareholder and director. B

[3] Soon after the execution of the Anton Piller order ('APO') the parties entered into a settlement agreement and recorded consent judgment. However, a day before that there was an application filed in the High Court for the appointment of an IJM. The applicant for the IJM, who is a shareholder and director of the various companies controlled by the other factions, had held himself out as a creditor of the target company who was concerned purely and primarily with the recovering of his advances to the company and that the chances of recovery would be enhanced if a judicial manager ('JM') is appointed in place of its sole director to manage the target company as a going concern and in due course for the applicant and his nominee to take over the target company. C D E

[4] The companies under the control of the majority shareholders ('appellant companies') cried foul and argued that there was no serious danger of the minority shareholder's loans to a new start-up in the target company that could not be repaid. Essentially, they said that it was the applicant who had enticed this sole shareholder cum director of the target company to leave the relevant appellant companies engaged in financial consultancy work and to set up a competing business. Not only that but every single key staff started leaving one by one to join the target company, with the applicant not surfacing at all in the target company but remaining as a funder and creditor. F G

PARTIES AND PERSONALITIES

[5] The various protagonists and the personalities associated with them in this escalating dispute shall now be introduced. H

[6] The applicant in the High Court below via an ex parte OS filed on 18 January 2021 was Loh Teck Wah ('the applicant' or 'Loh'). The target company as the respondent is Fintree Capital Sdn Bhd ('Fintree'). The appellant companies applied to intervene in the OS proceedings and they were allowed to intervene as the first to the fifth interveners below to object to the IJM application. I

[7] Their names are PNL Capital Sdn Bhd ('PNL Capital'), PNL Business Services Sdn Bhd ('PNL Business'), PNL Trading Sdn Bhd ('PNL Trading'), Subang Industry Park Sdn Bhd ('Subang Industry') and Tian An Trading Sdn Bhd ('Tian An Trading') as the first intervener to the fifth intervener respectively. They shall be conveniently called the 'PNL Group'. Only the first and second interveners are into the business of providing financial and management consultancy services, the business which is now the subject matter of this OS.

[8] The first to the fifth interveners are the appellants in Appeals No W-02(IM)-1229–06 of 2021 ('Appeal 1229') and No W-02(A)-1230–06 of 2021 ('Appeal 1230') against the High Court's decision on 8 June 2021 to dismiss the appellants' application to set aside and to strike out the ex parte IJM order and in granting Loh's application for a JMO.

[9] The sixth intervener is Liew Chia Soon ('Liew') and he was the most senior and longest serving staff of PNL Group, having commenced work on 21 August 2008 and served the PNL Group for 12 years. He was later on 25 May 2017 made in charge of finance and the entire operations of the PNL Group before he resigned on 17 March 2020 and left on 17 April 2020,

[10] It was later discovered by the appellants that Liew had become the sole-shareholder and director of Fintree. Fintree was incorporated on 14 May 2020 with an issued and paid-up capital of RM100,000 comprising 100,000 shares with its business being primarily that of providing financial consultancy services.

[11] Liew is also the appellant in these two appeals in W-02(A)-1232–06 of 2021 ('Appeal 1232') and W-02(IM)-1231–06 of 2021 ('Appeal 1231') against the High Court's decision to dismiss the appellants' application to set aside and to strike out the ex parte IJM order and in granting Loh's application for a JMO.

[12] Loh is the first respondent in all the four appeals No 1229 and 1230 by the PNL Group as appellants and in Appeals Nos 1231 and 1232 by Liew as the appellant. Fintree is the second respondent in all the four appeals, through the IJM and later JM in one Mohd Afrizan bin Husain.

[13] The seventh intervener is one Kang Mooi Chin ('Vanessa') who was an ex-independent contractor of PNL Capital and who has now joined Fintree, performing the same role of introducing clients and securing business for the consultancy work. She supports Loh's application as a contingent creditor. She is the third respondent in all the four appeals.

[14] With respect to the shareholders in the PNL Group of Companies, they are Dr Lim Pang Kiam ('Paul'), Yap Chee Kheng ('Nicholas') and the applicant Loh with Paul and Nicholas holding 66% in the first intervener and 64% in the second and third interveners and the rest of the shareholding is by Loh. As for the fourth intervener, it is wholly-owned by the third intervener and the fifth intervener is 88% owned by Paul and Nicholas. Once the dispute had arisen, Paul and Nicholas were aligned together forming the majority and Loh found himself in the minority.

[15] As for directorships, Paul and Nicholas constitute the 2/3 majority of the board of directors for the first to the fourth interveners and the whole board of directors for the fifth intervener.

BEFORE THE HIGH COURT

[16] The PNL Group as appellants argued that there is a lack of bona fides on the part of the applicant who is in reality a shadow director of Fintree with all the staff reporting to him including applying for their leave. Whilst there is nothing wrong in law to have a shareholder's fight at various fronts, it would be an abuse of process to have an IJM appointed to essentially remove one's nominee from managing the target company and under what is on the surface and ostensibly an effort to revive the target company so that the creditors would have a better prospect of recovering what was due to them. Such a predominant overriding intention would be for a collateral purpose.

[17] There were no creditors supporting the application except another ex-independent contractor of one of the appellant companies, Vanessa, who was claiming for her commission which she said is due to her in the sum of RM2,945,111.53 as representing 50% of the gross fees billed to clients, which presumably was the commission package when she was in the previous appellant companies. Apparently, the services provided included fund raising solution services and investment solutions.

[18] As the fees have not been collected yet it would mean that there would be at least RM6m that would be collectable from clients, going by what Vanessa said as a supporting creditor. If that be so there would be more than enough to pay all creditors including the applicant who said he had advanced about RM500,000 towards the working capital of the new start-up in Fintree.

[19] Among the documents recovered following the execution of the APO were documents belonging to the PNL Group under the control of the majority shareholders and also name cards and email address of the applicant bearing Fintree's name. There was also other incriminating evidence disclosed of efforts to upload confidential information of clients' database from the PNL

Group into the cloud server of the sole shareholder of Fintree ie Liew and then to delete it clean from the appellant companies' notebooks.

[20] The applicant as a creditor seems to know all about the history and activities and indeed the ins and outs of Fintree, a new start-up of hardly eight months old when the implosion happened. The PNL Group argued that Fintree, with its sole-shareholder and director in Liew, had been set up as part of the applicant's overall scheme of strategised exit from the appellant companies where he found himself to be in the minority. For most of the five companies, the applicant holding about 1/3 of the shares, found himself pitted against the other two shareholders with the remaining 2/3.

[21] The appellants in the PNL Group were in effect saying that the applicant cannot leverage the process of appointing an IJM to gain an unfair and collateral advantage over the majority in an escalating shareholders' disputes for it was when incriminating evidence was retrieved through the APO and the sole-shareholder and director agreed to resolve all matters in a consent judgment recorded that this application was rushed through to, as it were, scuttle the settlement.

[22] The applicant was not a party in that other suit and so would have to intervene in order to refute the allegations raised against the applicant there including allegations of breach of fiduciary duties and the like. However, there were no reliefs or remedies sought against Loh as there was no cause of action pleaded against him. Suffice to say there was a need to prevent the consent judgment from being recorded as the trusted nominee of the applicant seemed to have a change of heart and was no longer taking instructions from the applicant.

[23] The consent judgment must be stopped and if already entered must be set aside. The OS was filed by the applicant Loh on 18 January 2021; the ex-party application was filed on 19 January 2021. The appellants contended that the flurry of activities after the ex parte IJM order was made on 20 January 2021, fortifies their belief in the applicant's abuse of the process of an IJM order. Both the applicant and the IJM applied to have the consent judgment set aside with the applicant having to apply for leave from the High Court to do so as the IJM order froze all legal actions against Fintree.

[24] The appellant companies said that there was never a serious concern about the applicant's so-called advances not being paid. After all it was a new start-up with hardly eight months into operation. Indeed, there was never any formal demand made or even a time-frame set in some documents to evidence when this advance is supposed to be paid in a start-up company that would need some time to generate a positive cash flow.

[25] To the appellants in the PNL Group it was more than obvious that there was an ulterior motive in wrestling control of Fintree or at least in controlling the damage that this trusted nominee would do if he were to admit to every wrong-doing alleged by the PNL Group. That according to the appellant companies was the motive and motivation in acting in an unholy haste to apply ex parte for an IJM order.

[26] The appellants argued that there was no need for the order to be applied for ex parte and there was non-disclosure of the shareholders' dispute that was brewing and that the use of an IJM order was like using a hammer to kill a fly and in the process, with a hammer in hand, everything appears to be a nail!

[27] The High Court was not persuaded and preferred to focus on the requirements of ss 404 and 405 of the CA 2016 such that once it could be found that these have been met, the High Court would be inclined to grant the order. The learned JC therefore granted the JMO on the following basis:

(a) Fintree was or will be unable to pay its debts;

(b) in compliance with s 405(1)(b) of the CA 2016, the making of a JMO would likely achieve one or more of the following purposes:

  (i) the survival of Fintree as a going concern; and

  (ii) a more advantageous realisation of Fintree's assets would be effected, than in a winding up.

(c) Liew, the sole director/shareholder of Fintree had no intention to maintain Fintree as a going concern; and

(d) it would be in the interest of Fintree and its creditors that a JMO be granted.

[28] It does not matter if the parties are having their disputes in other courts for the merits of those disputes would have to be decided in those other courts.

IN THE COURT OF APPEAL

[29] Dissatisfied with the High Court order in having the IJM appointed, both the PNL Group and Liew have appealed to this court. Appeal 1229 is in relation to the High Court's decision delivered on 8 June 2021 which dismissed the PNL Group's application, inter alia:

(a) to set aside the order dated 20 January 2021 granting ex parte which appointed Mohd Afrizan bin Husain as the IJM of Fintree; and

(b) to strike out the Kuala Lumpur OS No WA-28JM-1–01 of 2021 ('JM OS'), ie Loh's application to place Fintree under judicial management.

[30] Appeal 1230 is in relation to the High Court's decision which allowed Loh's application, inter alia:

(a) to place the Fintree under judicial management pursuant to s 405 of the Companies Act 2016; and

(b) Mohd Afrizan bin Husain be appointed as the JM of Fintree.

[31] The other two appeals were brought by Liew, namely, Appeal 1231 and Appeal 1232. Appeal 1231 is in relation to the High Court's decision delivered on 8 June 2021 which dismissed the Liew's application:

(a) to set aside the order dated 20 January 2021 granted ex parte which appointed Mohd Afrizan bin Husain as the IJM of Fintree; and

(b) to strike out the JM OS, ie Loh's application to place Fintree under judicial management.

[32] Appeal 1232 is in relation to the High Court's decision which allowed Loh's application:

(a) to place the Fintree under judicial management pursuant to s 405 of the Companies Act 2016; and

(b) Mohd Afrizan bin Husain be appointed as the JM of Fintree.

[33] The following grounds of appeal were argued before us:

(a) the learned judicial commissioner ('JC') failed to consider the history, role, nature and function of Fintree in the scheme of Loh to deceive the PNL Group. The application is an abuse of process and tainted with mala fide. It is filed with ulterior motive not justified for the purpose of judicial management mechanism;

(b) the application also did not meet the requirements of s 405 of the Companies Act 2016; and

(c) the ex parte order which appointed the interim judicial manager should not be made on ex parte basis:

(1) there is no statutory backing;

(2) there is failure to depose sufficient material to justify making of the order on ex parte basis; and

(3) there is non-disclosure of material facts.

[34] By an order granted on 20 August 2021, all four appeals were directed to be heard together and that parties are allowed to use and refer to one record of appeal filed in Appeal 1230.

Whether the application for the appointment of an IJM and the JMO was made mala fide and an abuse of process

[35] We agree with the learned JC that it is not for him to go into the merits of the shareholders' disputes which seem to be between Loh on one side and Paul and Nicholas on the other. Be that as it may, the court must not completely shut its eyes to the reality of such a dispute cascading over and contaminating an otherwise pure commercial consideration in the appointment of an IJM and subsequently the JMO.

[36] The High Court must take cognisance of what is not seriously disputed that both the minority and the majority could not agree on how they are to go separate ways. For Loh, he said there was an understanding reached with the majority that since they were not interested in the financial consultancy services business, he was allowed to start his own company and to take along the staff involved in the said business from PNL Capital.

[37] The majority said there was no such agreement and that as Loh wanted to take over PNL Capital, he had suggested to swap shares with Paul and Nicholas which the latter disagreed. The majority wanted to continue with the said business via the first and second appellants and so Loh set up a rival company Fintree to do the same business with the same people that were carrying on this business in PNL Capital and PNL Business (collectively called 'PNL').

[38] The majority said that Loh then secretly enticed Liew and the ex-employees to leave PNL and join Fintree. To achieve that clandestine purpose, Loh arranged the key staff of PNL to transfer out all confidential information; cover their tracks; tamper with documents to hide new customers from the knowledge of PNL; communicate via private emails on business dealings and instructed the staff to systematically resign from PNL.

[39] Suffice to say that the relevant letters of resignation of staff in quick succession were exhibited together with the exchange of incriminating emails between Loh, Liew and the staff leaving and the hatching and executing of the plans were carefully set out so as not to arouse the suspicion of PNL and in particular the majority shareholders in Paul and Nicholas. There was also disclosed the steps to be taken to download the confidential information of clients' list into a safe storage so as to escape detection of PNL and then to delete all information clean from the PNL notebooks before returning them. These were recovered and retrieved from the documents made available to the PNL Group in the search conducted of Fintree via the APO.

A **[40]** The appellants in the PNL Group also contended that at all material times, Loh was the shadow director of Fintree, and Liew was acting at his behest. All these were done when Loh was and still is the director of PNL Group save for the fifth appellant.

B **[41]** Upon Liew's resignation from PNL, Paul and Nicholas discovered confidential documents and/or information of PNL were downloaded from PNL's office server, uploaded to Liew's personal cloud storage and erasing software applications were used to cover the tracks.

C **[42]** Kuala Lumpur High Court Suit No WA-22NCC-623–13 of 2020 ('Suit 623') was thus commenced by PNL Group against Liew and Fintree and an APO was taken out on Fintree. Payment vouchers, accounting ledgers, sale and purchase agreements and other documents belonging to PNL were found in the office of Fintree. Evidence of collusion between Liew and Loh was also
D found.

[43] Liew had a change of heart and admitted his wrongdoings and affirmed that it was done on Loh's instruction. In light of discovery of the collusion, the
E majority argued that Liew showed intention to concede and settle Suit 623 amicably. He then changed the solicitors of Fintree to his choice as the initial solicitors were assigned Fintree and him at the behest of Loh.

[44] The inference urged upon us by the appellants was that Loh felt uneasy
F with the change of solicitors without consulting him. Three days after Liew's change of solicitors, Loh filed an application on 18 January 2021 to appoint an IJM. A day after the filing of the application, on 19 January 2021, the consent judgments were entered in Suit 623 between PNL, Liew and Fintree as settlement of the dispute between the parties in Suit 623. Suit 623 was
G terminated thereby.

[45] The consent judgment against Fintree provided, inter alia, that Fintree was prevented from accessing and using the confidential information of PNL Group and their clients. There was also a mandatory injunction that Fintree
H hand over all their files, computers and/or servers to be inspected by the PNL Group and to provide a list of persons to whom Fintree have shown the said confidential information. Payment wise there was an agreed special damages of RM695,206 to be paid being the cost to engage a forensic IT expert to retrieve the deleted documents and emails and other confident information.

I **[46]** At the same time, Loh also move the court on an ex parte basis to appoint an IJM, which was allowed by the High Court on 20 January 2021. According to the appellants the purpose of the application was to seize control of Fintree from Liew and to thwart the compromise made by Liew and Fintree,

taking advantage of the judicial management mechanism under the ss 405 and 410 of the CA 2016 which provide for statutory moratorium and for a judicial manager assuming power of director of the company.

[47] In the light of the serious allegations made by the respective parties against each other, the High Court must, though conscious of the fact that it is not deciding the shareholders' disputes, have regard to such facts as may be relevant to ascertain if the IJM application was made bona fide without it being weaponised as a tool to further the applicant's pecuniary and personal interest in the target company Fintree and to wrench control of it from its sole director by 'booting' him out with the appointment of the IJM.

[48] Whilst the appellants argued that the terms of consent judgments are against the interest of Loh, all that this court would say at this stage is that whoever has a legal interest in the outcome of a case, including the recording of a consent judgment may impress upon the court to allow it to intervene in the proceedings. Presumably it would be rather late in the day to do so once a consent judgment is recorded because the proceedings then would have terminated already.

[49] Order 15 r 6 of the Rules of Court 2012 ('the ROC 2012') provides as follows:

> (1) A cause of matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the matter.
>
> (2) Subject to this rule, *at any stage of the proceedings in any cause or matter*, the court may on such terms as it thinks just and either of its own motion or on application:
>
> (a) ...
>
> (b) Order any of the following persons to be added as a party namely: ... (Emphasis added.)

[50] In *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd & Other Appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121 the Federal Court had the opportunity to consider the words 'at any stage of the proceedings' in O 15 r 6 of the then Rules of the High Court 1980 and held that:

> [52] What conclusions can be drawn from the provision of O 15 r 6 of the RHC and the cases discussed above? I think, they are as follows:
>
> [53] First, an application to set aside an order for sale by an existing party to the proceeding may be made before the final order is perfected, otherwise the judge is functus officio.

[51] What is rather unusual and indeed strange is the apparent co-ordination of the applicant with the IJM and their concerted efforts in filing separate applications to defer the sealing of the consent judgments and separate fresh applications to set aside the consent judgments recorded on 19 January 2021. No consultation or inquiry was made by the IJM with Liew on whether such move was for the interest of Fintree. It would be fair to say that the decision of the IJM thus far had been made by merely consulting with and referring to Loh.

[52] The intended consequence once the IJM order was made ex parte was that the applicant Loh would have effectively disabled Liew, the sole director of Fintree, from sealing the consent judgment and to make decisions which may expose Loh to further liabilities. Liew had been pulled away and paralysed from managing Fintree when it has not been shown how he has acted other than in the best interest of Fintree; he being able to make decisions for himself and he being its sole shareholder.

[53] The appellants further postulated that the applicant Loh, under the guise of a creditor who has not been paid, would then be able to continue his competing business through the JM in breach of his fiduciary duties owed to PNL. It would also stifle any attempts by Liew to settle Suit 623 and to implement the terms of the settlement. It cannot be denied that the terms of the consent judgments would effectively throw a spanner in the works of Loh.

[54] We must bear in the forefront of our minds that s 405 of the CA 2016 was enacted to revive an insolvent company and allow a professional manager to design a scheme for revival of the company. It has its rehabilitative and restorative properties designed for the purpose of reviving a company in financial distress. Its prophylactic properties should not be abused by anyone to advance his own personal interest in the target company and to wrestle control of it and for his own gain simply because the director of the target company no longer does his bidding.

[55] We are in agreement with learned counsel for the appellants that the judicial management mechanism cannot be used by unsecured creditors to substitute and enforce their views on management of the affairs of the company, and in this case, the settlement and concession of Liew to Suit 623. Liew as the single shareholder and director is able to decide for himself what is in the best interest of the company Fintree and in the absence of evidence that he is causing harm to himself, being its sole shareholder, no court should interfere at the stage of an IJM application to grant the appointment which would have the effect of allowing a party in a shareholders' dispute to gain an unfair advantage over the other party under what is held out ostensibly to protect the interests of so-called creditors.

[56] We would not go so far as saying they the learned JC has erred in refusing to acknowledge the fact that Fintree was a vehicle created by Loh to use confidential information and to conduct competing business with PNL though we must say that at this stage the evidence in that direction has satisfied the prima facie threshold. It is of course left to Liew to decide whether or not a settlement in the terms of the consent judgments would be in the best interest of himself and of Fintree of which he is the sole shareholder and director.

[57] The court would not ordinarily go behind the decision of a company made via its sole shareholder and director unless it is used as a vehicle to commit fraud. If at all there is fraud being perpetrated it appears more a case where a de facto director and perhaps even shareholder springs to action and shows more than a usual business interest in a debtor company all under the guise of the target company being mismanaged to the detriment of creditors.

[58] The learned JC should be more alert in interpreting the events surrounding the shareholders' disputes as evidenced in the affidavits filed by the parties and to scrutinise the intention of the applicant Loh against the backdrop of escalating disputes which, granted, are best decided in the various High Courts where the suits and actions are filed. Suffice to say that for the moment the court would need the sieve the intention of the applicant to ascertain that his action has not been triggered by the over-riding concern to further his own personal and pecuniary interest in a far bigger conflagration where the battle lines are now being drawn.

[59] Perhaps the picture would be clearer if one were to ask what would an ordinary creditor not having a vendetta with the company's majority shareholders do in the case of a loan advanced to a company which is a new start-up of hardly eight months old? In the first place there are no terms of the loans advanced to Fintree and it would seem that it is a case of a friendly loan where the borrower would pay once it has a positive cash flow. Such a creditor concerned about repayment would perhaps want to put the terms in writing.

[60] Assuming for a moment that it is a loan on demand, we would expect a formal demand being made and even a demand under s 466 of the CA 2016 and after the expiry of 21 days, the presumption of inability to pay its debt would kick in and a petition to wind up Fintree could be filed. However, the applicant Loh is not interested in that even though upon winding up the liquidator can always investigate whether the business of the company had been carried out to defraud creditors.

[61] That would be too troublesome and tedious a process because what is critical and crucial at this stage is to set aside the consent judgments for Fintree is no longer safe in the hands of Liew who has switched camps as it were, and

so Liew has to be removed at all costs. The quickest way to remove Liew is via the mechanism of the appointment of an IJM because the moment an application is filed in the OS, it has the prophylactic effect of preventing any further action against the company, even the recording of a consent judgment.

[62] The intended consequence was thus made to look like an unintended consequence that would ensue once a genuine creditor satisfies the court of the requirements of ss 404 and 405 of the CA 2016.

[63] Little wonder that all efforts were concentrated on preventing the consent judgments from being sealed and to set aside the consent judgments. It is a reasonable inference which the court should draw from the unholy haste with which both Loh and the IJM proceeded in tandem, united as it were against a common opposition against the PNL Group and Liew.

[64] Suit 623 is for breach of contract and breach of confidential information and conspiracy to injure the business of the PNL Group brought against Fintree and Liew. Fintree and Liew are more than able to defend themselves.

[65] If it is a case of Loh having put a wrong person to front for him or as his nominee in Fintree, then his remedy rests elsewhere rather than to call upon the court for help, on an ex parte basis in that he would suffer irreparable harm if there is any delay in the court appointing an IJM to help him recover what appears to be his investment in Fintree.

[66] If the loan had been advanced to Fintree we would expect evidence of that in the accounts of Fintree but there has been no record of it being produced. Accepting that it is a loan to Fintree, the nature and character of the loan, which appears more like a friendly loan, with no written terms being produced, appears to be the type that may easily be capitalised once it is safe for Loh to surface in Fintree. As it is he is still a director in the PNL Group and must not be seen to be competing particularly with PNL in the same business.

[67] That intention becomes more evident when it is learned that Loh's intention is to revive the business of Fintree and later he would make an offer to purchase it probably by setting off what is due and owing to him.

[68] The costs of having a JM appointed does not justify the whole exercise of judicial management. A liquidator appointed upon a winding up would be able to effectively recover the RM6m said to be billable by a supporting contingent creditor in Vanessa whose own sworn affidavit said that 50% of that is due to her being her commission payable upon collection, as has been the practice when she was working with PNL Capital.

[69] There would be more than enough to pay all creditors including the applicant Loh and upon that being done, a permanent stay of the winding up order can be made. The company Fintree would revert control to its sole shareholder and director in Liew but that is not what Loh wanted.

[70] As it is Loh has not commenced any action against Fintree to recover his loan, assuming it is payable upon demand and much less a judgment taken for the loan advanced. If Loh is serious in recovering his loan we would have expected some reminders sent to Fintree as to the plan of repayment. The fact of the matter is that the loan was not the concern nor the fear of it being irrecoverable. The prime motivation was to disable the director Liew so that he would not be able to do further harm in Loh's personal battle with the majority shareholders in the bigger disputes that are unfolding.

[71] There is of course nothing wrong to fight a shareholders' dispute on various fronts — from an oppression petition to a derivative action to an action for production and access to accounting records of the company and to having a receiver appointed but always that the process of the court should not be abused for a collateral purpose.

[72] We are satisfied that if the High Court had properly considered the nature of the disputes unfolding between the parties without deciding on them, as they are before the different courts, the High Court would have concluded that to grant an IJM Order would be akin to using a hammer to kill a fly — an instrument not designed for that purpose and therefore harmful to the company.

[73] In any event it would be an abuse of the process and reek of mala fide. The court must see beyond the shadow and charade to the substance and the core of the disputes between the shareholders. The protective shield of judicial management was sought not for the protection of the company Fintree but for the protection of and promoting the interest of the minority shareholder in the applicant Loh in a shareholders' fight.

[74] The court would not allow its process to be abused for a collateral purpose.

Whether the requirements under ss 404 and 405(1) CA 2016 have been met

That the company is or will be unable to pay its debts

[75] Sections 404 and 405(1), (4) and (8) of the CA 2016 provide as follows:

> 404 *Application to Court for a company to be placed under judicial management and for appointment of a judicial manager*
>
> An application for an order that a company should be placed under a judicial management and for the appointment of a judicial manager may be made to the Court by the company or its creditor if the company or its creditor considers that —
>
> (a) the company *is* or *will be unable to pay its debts*; and
>
> (b) there is a *reasonable probability of rehabilitating the company* or of *preserving all or part of its business as a going concern* or that otherwise the *interests of creditors would be better served* than by resorting to a winding up.
>
> 405 *Power of Court to make a judicial management order and appoint a judicial manager*
>
> (1) Where a company or its directors, under a resolution of its members or the board of directors, or a creditor, including any contingent or prospective or all or any of those parties, together or separately, makes an application under section 404, the Court may make a judicial management order in relation to the company if —
>
> (a) the Court is *satisfied* that *the company is or will be unable to pay its debts*; and
>
> (b) the Court considers that the making of the order would be *likely to achieve one or more of the following purposes*:
>
> (i) the *survival of the company*, or the whole or part of its undertaking as a going concern;
>
> (ii) the approval under s 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section;
>
> (iii) *a more advantageous realisation of the company's assets* would be effected than on a winding up.
>
> ...
>
> (4) Any judicial management order made under subsection (1) shall direct that during the period in which the order is in force, the affairs, business and property of the company shall be managed by a judicial manager appointed by the Court.
>
> ...
>
> (8) The definition in section 466 of 'inability to pay debts' shall apply for the purposes of this section as it applies for the purposes of Subdivision 7 of Division 1 of Part IV. (Emphasis added.)

[76] The first requirement for a JMO to be made is that, the court must be satisfied that Fintree is or will be unable to pay its debts under s 405(1)(a) of the

CA 2016. If that requirement is not met, there is no necessity to consider further the requirements of s 405(1)(b).

[77] To prove the target company's insolvency the applicant must tender accurate, true and reliable evidence. We find merits in the appellants' argument that the evidence provided by Loh to prove Fintree's insolvency is neither accurate nor reliable.

[78] The financial statement was dated 2 1/2 months before filing of the application. Liew produced evidence to suggest that Fintree has a net profit of RM68,288.87 as at or around January 2021. Vanessa Kang affirmed that she would receive 50% of the fees chargeable to the clients referred by her to Fintree. She claimed that Fintree owes her commissions of RM2,945,118.53. Assuming for a moment that this claim is true, Fintree would have earned approximately RM6m in gross revenue at least, since its incorporation on 14 May 2020, some eight months ago.

[79] Learned counsel for the appellants submitted that it is unfair and unjust to appoint a JM over a company within eight months of business on the ground of insolvency when the so-called creditors are only two who are not trade creditors of the Fintree. One creditor is the applicant Loh who has invested long term in it by advancing the initial capital that it needs before it has a positive cash flow. Any advance to subscribing to the initial paid-up capital of RM100,000 for Fintree would appear to be a personal loan to Liew from Loh.

[80] The other creditor, Vanessa, said to be the biggest creditor of Fintree, is at best only a contingent creditor of Fintree where her commission is at best only payable after the fees generated from the clients introduced by her has been collected.

[81] It is not disputed that there is no statutory notice issued under s 466(1)(a) to trigger the presumption of 'inability to pay its debts' after the expiry of the 21 days. Perhaps it was a case where there was no time to wait for the period of 21 days to lapse even though it would give the applicant the added benefit of a presumption of such an inability.

[82] The applicant Loh is of course at liberty to satisfy the court of Fintree's inability to pay its debts by reference to s 466(1)(c) if:

> it is proved to the satisfaction of the Court that the company is unable to pay its debts and in determining whether a company us unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

[83] It was submitted by learned counsel for the applicant Loh that based on the balance sheet of Fintree (CCB, encl 73, pp 199–200), the financial position of Fintree as at 31 October 2020 was as follows:

Table A

Current asset	RM203,383.01
Non-current asset	RM36,269.52
Total Assets	RM263,549.58
Total Liabilities	RM448,678.52*

*This had yet to take into account the commission payable to Vanessa in the sum of RM2,945,118.53

[84] Further, based on the second Preliminary Report prepared by the IJM, the financial position of Fintree as at 30 March 2021 was as follow:

Table B

	Amount	Reference
Bank balances	RM187,500.00	CCB, Encl 82, Page 173, Para 3(q)
Total debt (subject to final verification)	RM4,870,913.29#	CCB, Encl 82, Page 172, Para 3(k)

#After taking into account amongst others, Vanessa's claim in the sum of RM2,945,118.53.

[85] Learned counsel for Loh submitted confidently that from Table A and Table B above, the liabilities of Fintree far exceed its assets and thus, it would be unable to settle its debts/liabilities even after all of its assets have been utilised to the fullest extent. Based on the second preliminary report of the IJM the amount advanced by Loh is captured as RM120,000 only. See para [58] of the grounds of judgment of the learned JC reported in *Loh Teck Wah v Fintree Capital Sdn Bhd (PNL Capital Sdn Bhd & Ors, interveners)* [2022] 11 MLJ 464; [2021] 1 LNS 782.

[86] Professionally and more pointedly the IJM had confirmed in his second preliminary report that, Fintree was unable to pay off its debts as they fall due (CCB, encl 82, p 173, para 3(o)).

[87] Learned counsel for Loh also referred to the Supreme Court case of *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313, where Gunn Chit Tuan SCJ (as he then was) held that, if a company has no assets available to meet its current liabilities, it is considered commercially insolvent and may be wound up. His Lordship held as follows:

In this case, the presumption of insolvency arises when the requirements of s 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plant* case and cite the following observations from *Buckley on the Companies Act* (13th Ed) at p 460:

> In such a case it us useless to say that if its assets are realized there will be ample to pay twenty shillings in the pund: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, *yet if it has no assets available to meet its current liabilities it is commercially insolvent and may be wound up.* (Emphasis added.)

[88] The case of *Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Sdn Bhd* [1997] 5 MLJ 377 was also cited where it was held that in determining the issue of inability to pay debt, the High Court considered the assets and liabilities of the company. Kamalanathan Ratnam JC (as he then was) held as follows:

> Section 218(2)(c) is very clear. To ascertain if a company is unable to pay its debt the court shall take into account the contingent and prospective liabilities of the company. In order to ascertain its liabilities, *it is proper that its assets are also ascertained because only upon ensuring that there is insufficient assets to meet the debts can there be ascertained liabilities. Therefore, the current assets must be taken stock of to see if after considering the total liabilities both contingent and prospective there is a surplus deficit*. (Emphasis added.)

[89] We have no quarrel nor quibble with what is unquestionably the settled test with respect to whether a company is 'unable to pay its debts'.

[90] We find that the two IJM Reports which were prepared took into consideration contingent liabilities of Fintree without correspondingly taking into consideration contingent assets of Fintree. Assuming that what Vanessa said is true which is what the IJM believed, then the IJM would have correspondingly recognised that there would be a sum of about RM6m in fees which have been billed or are billable. If indeed Vanessa had done work and serviced clients that she had introduced to the tune of about RM2.9m constituting 50% of the fees which have not been collected yet, then these sums of about RM6m would be debts outstanding from clients for fees incurred which in accounting terms would be reflected as assets of the Company Fintree.

[91] Rather unfortunately, this is not reflected in the IJM's two reports. Either it is an oversight or that the IJM does not quite believe Vanessa or that the reports were prepared without the input from Liew, the sole-shareholder

A and director who would be able to provide his side of the financials of Fintree and if his version has been rejected, the IJM should then state why he had so concluded.

B **[92]** With respect it is therefore not correct for Loh the applicant and the IJM to say that Fintree is unable to pay its debt as its liabilities exceed its assets by RM2,302,298.29 as reported in the second IJM Reports. With the RM6m in fees to be collected for the third respondent Vanessa had so confidently proclaimed in order to justify and recognise her contingent liability of RM2.9m there is more than enough to pay all creditors with a surplus C remaining. The surplus is about RM6m – RM2,302,298.29 = RM3,697,701.71. Therefore, the conclusion that the return to creditors is only RM0.039 per Ringgit of debt if Fintree was to be wound up, is with respect, an unwarranted conclusion arrived at in not giving equal treatment in recognising D contingent liability without recognising contingent asset.

[93] By the same token, it would not be correct that the amount of RM695,206 agreed to be paid by Fintree to the PNL Group would far exceed the assets of the company such that the company would have to fold up. As E explained, that conclusion was arrived at by taking into account the amount of contingent liability of RM2,945,118.53 from the so-called fees due to Vanessa for work that she had already done for clients without taking into account the corresponding contingent assets from fees to be billed and collected from clients of a corresponding RM6m.

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[94] The second IJM Report appeared skewed to put in a strong word for Loh and third respondent, Vanessa, to be at the helm of Fintree to continue servicing its contracts and to ensure Fintree as a going concern. That concern is G fraught with land mines as Loh, Vanessa and the IJM should realise that there is a pending suit in Suit 623 where the PNL Group had sued Liew and Fintree for breach of contract and damages for unlawful use of confidential information acquired when Liew was under the employ of the PNL Group.

H **[95]** Whilst we not unaware that some applicants may nominate a 'friendly' JM what is important is that the JM must be like Caesar's wife, to be above reproach. He must not just act impartially but must be seen to be impartial and independent. At para [80] of his grounds of judgment, the learned JC had made reference to the concerns of the appellants that the JM Afrizan is unfit on I the grounds that he and his audit firm had been sanctioned by the Audit Oversight Board ('AOB') of the Securities Commission. The learned JC had taken judicial notice that the decision by the Securities Commission had since been quashed by the High Court following Afrizan's application for judicial review via Judicial Review No WA-25–553–12 of 2019.

[96] For the record and for completeness, we must state that the said decision of the High Court had been reversed by the Court of Appeal on 10 December 2021 in Appeal No W-01(A)-391–08 of 2020 and the fine and suspension imposed by the AOB had been reinstated. The Federal Court had on 17 August 2022 dismissed Afrizan's leave application to appeal to the Federal Court. We say no more because we have not taken the above as a factor against the appointment of the said Afrizan as a JM. We only mention the above in passing as the learned JC had referred to a matter that had been overtaken by subsequent events and only for the limited purpose of underlining the fact that a JM must be careful to so conduct himself that there would be no room for any allegation of bias against Liew or his solicitors.

[97] The requirement of a finding to the satisfaction of the court that the company is or would not be able to pay its debt is a *sine qua non* for the appointing of a JM over a company. Once that is not satisfied, the inquiry of the court would end there. That requirement must first be satisfied and if not, no JMO should be made and the application for judicial management dismissed.

[98] However, for completeness we shall discuss the other conditions with respect to its relevance in the circumstances of this case.

Reasonable probability of rehabilitating the company and of preserving its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up

[99] The learned JC found that one of the purposes under s 405(1)(b)(iii) of the CA 2016 had been fulfilled and held as follow (CCB, encl 71, p 188, paras 61(iv) and 61(vi)):

(a) Fintree is in a position where it would incur loss and damage by reason of not being able to engage in its business activities and that this situation would be able to be corrected if a JMO is made which will then amount to a 'more advantageous' realisation of Fintree's assets than on a winding up; and

(b) the financial return to Fintree' creditors would be better if the JMO is allowed compared to a winding up situation.

[100] In that regard, the learned JC found that, the making of the JMO would likely achieve the following purposes:

(a) the survival of Fintree as a going concern; and

(b) a more advantageous realisation of Fintree's assets would be effected than on a winding up.

[101] Under s 405(1)(b) of the CA 2016, the court merely needs to 'consider' that, there is a 'likelihood' that one of the purposes stated thereunder is achievable in:

> the Court *considers* that the making of the order would be *likely* to achieve one or more of the following purposes. (Emphasis added.)

[102] We accept the fact that with respect to the requirement that 'the company is or will be unable to pay its debt' under s 405(1)(a) a higher threshold of persuasion is required in that the court has to be so 'satisfied' whereas under s 405(1)(b) the expression 'likely' with respect to achieving one or more of the purposes set out is indicative of a lower threshold of persuasion. See the cases of *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473; [2018] 10 CLJ 412, *Re Harris Simons Construction Ltd* [1989] BCLC 202.

[103] The meaning of 'likely' in the context of the requirements to be satisfied for the appointment of a JM was elucidated in *AA Mutual International Insurance Co Ltd Re* [2004] EWHC 2430 (Ch) and followed in *Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd)* [2022] 7 MLJ 76; [2020] 1 LNS 1617 as follows:

> The term 'likely' has not been defined in the Companies Act 2016 but the term 'likely' has been held in the UK in the case of *AA Mutual International Insurance Co Ltd Re* [2004] EWHC 2430 (Ch) to mean the applicant to be demonstrate on a balance of probabilities that *it is 'more probable than not' that this criterion will be fulfilled*. I respectfully adopt the same definition for the purposes of defining the term 'likely' under s 405 of the Companies Act 2016. (Emphasis added.)

[104] As for the expression 'going concern' under s 405(1)(b) of the CA 2016 that has been stated in *Leadmont Development Sdn Bhd* by Wong Chee Lin J under s 405(1)(b) of the CA 2016 to mean 'will continue its operations for the foreseeable future'.

[105] It was submitted by learned counsel for Loh that Fintree's sole director and shareholder, Liew had indicated that, he had no plans to continue with the business of Fintree (CCB, encl 73, p 29, para 19.4). It was further argued that if Liew had continued to manage Fintree, it would have no income. On the contrary, Vanessa being an independent contractor of Fintree and who had introduced all of her clients to Fintree, had given an assurance to the IJM that, she would be able to introduce more clients to Fintree (CCB, encl 82, p 169, para 2(k)).

[106] As indicated, this court is satisfied that the amount that may be collected for the work done and billable so far as attributed to Vanessa, would

be more than enough to pay all the creditors. It is of course for the sole-owner and director of Fintree in Liew to decide the future direction of Fintree for so long as he is not acting against the interest of creditors. Liew is in the best position to decide if by continuing the consultancy business Fintree and him would be in breach of any confidential information that had come to them from the PNL Group.

[107] Where the fees to be collected would be more than enough to pay all the creditors as this court is satisfied in this case, there is no necessity of the IJM to continue the business of Fintree as a going concern as to do so would not justify the costs. As it is a sum of RM300,000 has been incurred as the IJM's fees and another RM150,000 being other fees.

[108] If it is indeed true that the IJM expected that, the revenue generated from Fintree's existing clients and that from new potential businesses, to be in the region of RM2.4m over a period of six months, subject to it continuing its business and operation (CCB, encl 82, pp 169 and 172, para 2(i) and 3(n)), then since the business here is more in the nature of personal to holder, it would make more sense for Vanessa, being an independent contractor, to function independently rather than parking herself with Fintree that is now embroiled in litigation with allegations of Liew being in breach of contract and having unlawfully used the confidential information of the PNL Group for his and Fintree's benefit.

[109] It is a misplaced confidence to say that it is more likely than not that Fintree if placed under judicial management would be able to survive as a going concern, or in the least, achieve a more advantageous realisation of the company's assets compared to a winding up.

[110] It was alleged that the consent judgments had caused the business of Fintree to come to a complete halt. It is of course for the sole director and shareholder of Fintree ie Liew to decide what is in the best interest of Fintree and if by continuing the business, there would be a breach of confidential information, he would be in the best position to decide if such a move is worth the risk of exposure to liabilities.

[111] There was thus no real need for, much less the urgency that Fintree should be immediately placed under judicial management. No other creditors are complaining or have made any demands. Both the applicant Loh and the contingent creditor Vanessa have more than a casual creditor's interest in recovering their debt; they have an eye on the bigger battle of a shareholders' dispute that is now being fought at various fronts.

[112] On this ground alone the IJM order and JM order ought to be set aside.

Whether the ex parte IJM order should be set aside for non-disclosure of material facts

[113] Whilst there is no prohibition in applying for an IJM order ex parte, there must be shown a real urgency for it. It was brought to our attention by learned counsel for the respondent that in *Mansion Properties Sdn Bhd v Sham Chin Yen & Ors* [2021] 1 MLJ 527 the IJM was granted ex parte. We note that the legislation is silent on the need for IJM applications to be made inter parte. The Companies (Corporate Rescue Mechanism) Rules 2018 and the High Court on several occasions recognised that an IJM order may be made on an ex parte basis. See the case of *Re KS Energy Ltd and another* [2020] SGHC 198.

[114] While that may be so, the attendant risk that comes with an ex parte application is that upon an inter partes hearing, if it is shown that there has been non-disclosure of material facts, then the ex parte IJM would be set aside.

[115] The applicant Loh had failed to state in his affidavit the reasons to justify the appointment of an IJM on an ex parte basis. No explanation was given as to why no prior notice was given to solicitors on record.

[116] There is sufficient material non-disclosure for us to conclude that Loh has more than the casual interest of a creditor, who is merely concerned that his debt in the nature of advances to the company may not be repaid. While the court need not have to come to a conclusion at this stage that he is the directing mind and shadow director of Fintree, there is prima facie evidence pointing in that direction such that the court should be wary of the urgent need to make an IJM order when in reality a collateral purpose in preventing the consent judgments being recorded, sealed and extracted was the trigger for such an ex parte application.

[117] There is prima facie evidence pointing in the direction that Fintree was used by Loh as a proxy to conduct competing business which he did not obtain approval or consent from the general meeting of PNL.

[118] There is strong prima facie evidence that Loh had instructed Liew and the ex-employees to delete and tamper with the PNL's documents, records and information and moved the PNL's documents to Fintree office, leading to PNL obtaining the APO.

[119] Following Liew's resignation, the appellants appointed an IT forensic investigation firm, LE Global Services Sdn Bhd ('LGMS') to conduct a forensic check on two company laptops surrendered by Liew ('company laptops'). Following the analysis on the company laptops by LGMS, the following was discovered:

(a) a copy of most of and/or all of the files, records, spreadsheets, reports, documents, data and information was downloaded into the company laptops possessed by Liew from the office server of the appellant companies;

(b) the aforesaid files, data and information belonging to the appellant companies was then uploaded to the personal cloud storage of Liew; and

(c) there was usage of erasing software applications being traced on the company laptops in an attempt to conceal the aforesaid actions.

[120] As stated, it was later discovered that Liew had become the sole-shareholder and director of Fintree which was only incorporated on 14 May 2020. It was also discovered that the staff under the payroll of the first and second appellants ie PNL, had joined Fintree:

(a) Beverly Ng and Michelle Mah (on probation) — terminated on 2 March 2020;

(b) Stephen Ong — resigned on 27 March 2020;

(c) Jovis Ong — resigned on 30 April 2020; and

(d) Janet Lam — resigned on 11 November 2020.

[121] The appellant companies said that they have cogent reasons to believe that behind the incorporation of Fintree, there was a clandestine scheme to fraudulently and commercially exploit their confidential information, data and records. That was the reason for the appellant companies to commence an action against Liew and Fintree, ie Suit 623.

[122] The appellant companies obtained an APO from the High Court on 7 January 2021. The raid at the premises of Liew and Fintree took place on 12 February 2021, 13 February 2021 and 14 February 2021. The Supervising Solicitors' Reports are at pp 41–82 and 86–125 of the record of appeal in Appeal 1230, Vol 2S (encl 35 in Appeal 1230).

[123] After the raid and upon perusing some of the documents and information obtained, it was discovered, inter alia, that:

(a) Loh arranged for key staff of the appellants to systematically resign;
see: the *WhatsApp* conversation between Loh and Liew, Liew and Jovis Ong

(b) pp 86–89 of encl 21, Appeal 1229; and

(c) pp 86–89 of encl 51, Appeal 1230.

(a) clientele and accounting documents of the appellant companies were transferred to Fintree in hard and soft copies;

(b) key staff of the appellant companies were instructed to transfer all private and confidential records of the appellant companies through physical movement and private emails to avoid detection by the officer of the appellant companies;

see: the *WhatsApp* conversation

(i) pp 92–93 of encl 21, Appeal 1229

(ii) pp 92–93 of encl 51, Appeal; 1230

(c) payment vouchers, accounting ledgers, sale and purchase agreements and other documents belonging to the appellant companies were found in the premises of Fintree:

(i) see: copies of the relevant documents discovered

(ii) pp 96–108 of encl 21, Appeal 1229

(iii) pp 96–108 of encl 51, Appeal;p 1230

[124] The appellant companies further contended that Loh instructed key staff of the appellant companies to steal, transfer, clear, remove and/or clean up stealing trace in their computers before their resignation so that the records of transferring data, accounts, ledgers, customer information, assignment, business leads and all other information out from the appellant companies will not surface/be traced/discovered/realised/obtained.

See: the WhatsApp conversation trail between Loh, Liew, Vanessa Kang and Stephen Ong at pp 111–115 of encl 21, Appeal 1229 and at pp 111–115 of encl 51, Appeal 1230.

[125] Messrs Syed Ibrahim & Co was presumably and initially appointed to act on behalf of Liew and Fintree in Suit 623. However, the appellant companies argued, that the discovery of the above-mentioned documents/evidence from the raid proves that Fintree and Liew had colluded with Loh to cause harm to the appellant companies.

[126] The appellant companies further narrated that being faced with the incontrovertible evidence, they received on 14 January 2021, a hand-written note by Liew together with two letters by Liew and Fintree and a statement affirmed before a notary public, all dated 14 January 2021, discharging their then solicitors, Messrs Syed Ibrahim & Co and stating their intention to settle Suit 623 amicably and out of court.

[127] The natural question to ask was why was there a need to discharge one's previous solicitors just became one was trying to resolve a suit amicably. The inference that the appellants asked this court to draw was that Liew was not free to act on his own and on behalf of Fintree because Loh was the one who referred Liew and Fintree to Messrs Syed Ibrahim & Co. In fact, the suggestion went further in that it was Loh who appointed the said solicitors for Liew and Fintree. The appellants' submission was that Fintree and Liew were just Loh's proxies and nominees and as Loh was still a director of the most of the appellants companies, he could not openly surface and be seen as competing with them.

[128] After some exchange of letters between the appellants' solicitors in Suit 623, Messrs Iza Ng Yeoh & Kit and Liew and Fintree's new solicitors, the appellants entered into a settlement agreement and recorded consent judgments with Liew and Fintree on 19 January 2021 which fully and finally settled Suit 623.

See: the settlement agreement dated 19 January 2021
pp 147–182 of encl 21, Appeal 1229
pp 147–82 of encl 51, Appeal 1230
See: the consent judgment against Fintree
pp 42–59 of encl 21, Appeal 1229
pp 42–59 of encl 51, Appeal 1230.
See: the amended consent judgment against Liew
pp 185–200 of encl 21, Appeal 1229
pp 185–200 of encl 51, Appeal 1230.

[129] According to the appellants, Loh had to contain the 'damage' caused by the APO and swiftly initiated the JM OS to place Fintree under a JMO and appoint a JM for Fintree; effectively killing two birds with one stone in that no Settlement can be recorded in Suit 623 by Liew, now acting contrary to his instructions and that Liew is, with the appointment of the IJM, effectively removed from managing and deciding for Fintree.

[130] The applicant Loh was visibly agitated and anxious that the terms of the consent judgment against Fintree contained allegations by the PNL Group against Liew and Fintree that were admitted by Liew, and serious allegations against Loh accusing him of orchestrating a grand scheme to cause the near collapse of the businesses of the PNL Group.

[131] To be fair to the PNL Group they later deleted all references to Loh in the Amended consent judgment against Liew and offered to do the same for the one recorded against Fintree but was, rather strangely, refused by the IJM.

[132] The IJM applied in Kuala Lumpur OS No WA-24NCC-43–02 of 2021 to set aside the said consent judgment (CCB, encl 72, p 214, para 18(b)) against Fintree on the technical ground that upon filing the JM OS on 18 January 2021 no further proceeding can be had in Suit 623 including the recording of the consent judgment. The said consent judgment was set-aside by the Kuala Lumpur High Court on 30 November 2021 on ground that the OS having been filed on 18 January 2021, the consent judgment recorded on 19 January 2021 was invalid by virtue of s 410(c) of the CA 2016 which reads as follows:

> 410 Effect of application for a judicial management order
>
> During the period beginning with the making of an application for a judicial management order and ending with the making of such an order or the dismissal of the application —
>
> (a) no resolution shall be passed or order made for the winding up of the company;
>
> ...
>
> (c) *no other proceedings* and no execution or other legal process *shall be* commenced or *continued* and no distress may be levied against the company or its property except with leave of the Court and subject to such terms as the Court may impose. (Emphasis added.)

[133] Loh then withdrew his application to set aside the consent judgment. One would have thought that Loh would want to intervene to refute the various allegations made against him in the affidavits including perhaps putting in a counterclaim for conspiracy to injure his valid business carried out under Fintree. However, all that had fizzled out because the immediate purpose had been achieved with the setting aside of the consent judgment and the rest could be done at a more leisurely pace with the Fintree safely in the hands of his nominated JM.

[134] The consent judgements also provided that the PNL Group would retain permanent possession of documents and items seized during the APO Raid and that Fintree would pay the PNL Group of Companies a sum of RM695,206.

[135] Whilst Loh had disclosed the existence of Suit 623 during the hearing of the ex parte IJM application that alone is not enough. The fact that Loh had given an undertaking at para 8 of the IJM order that he would not object to any leave application by the PNL Group to proceed with Suit 623 is only natural and certainly unremarkable for otherwise the IJM order would have the effect of freezing all pending actions merely because of a debt owing to a creditor.

[136] Learned counsel for Loh submitted that with respect to the other allegations raised by the PNL Group and Liew including wrongdoings by Loh, these cannot be taken as non-disclosures given that they are factual disputes and in fact form the subject matter of other legal proceedings which have yet to be determined.

[137] Whilst that may be so, it is in the character of anyone moving a court ex parte to disclose to the court matters that may be raised by the other side in opposing the appointment ex parte of an IJM. One must be candid to open up one's set of cards because the court is being moved to grant an IJM without the benefit of hearing the company over whom the IJM is to be appointed, replacing the board of directors of the company in the process.

[138] What then is the urgency because the very act of filing the application for the appointment of a JM has the effect of staying all legal proceedings already commenced such that it cannot continue under s 410(c) of the CA 2016.

[139] Learned counsel for Loh had submitted that Loh is indeed a creditor of Fintree and not a contributory of Fintree as alleged by the PNL Group and Liew. This, according to learned counsel for Loh, is supported by Liew's admission that Loh had advanced monies to Fintree, and the fact that Loh does not hold any shares in Fintree.

[140] It is not that the company Fintree is improperly managed but that it is embroiled in another battle where the protagonist is the applicant Loh and Loh cannot in all clear conscience say that he is only concerned as a creditor that his advances to Fintree would not be repaid. Such a concern is far remote and peripheral to what is primarily a battle for the control of Fintree because Liew appears now to side with the majority shareholders and is no longer following the instructions of Loh.

[141] The rescue mechanism of judicial management cannot be hijacked for a different purpose in a wider dispute between shareholders that had little or no proper connection to realising one's debt that had not even been demanded which terms if any are oral and flexible in the context of investing in the company Fintree.

[142] There is no evidence to show that the JM is able to manage Fintree better than Liew. Liew was perfectly poised to excellently manage Fintree with the wealth of experience in financial consultancy and management gained from his 12 long years of service with the PNL Group and in particular with PNL. This is evident with a gross turnover of around RM6m in hardly eight months

into operation going by what Vanessa has proclaimed so confidently. In fact, Liew knows the ins and outs of the business as it was his ecosystem when he was in the PNL Group.

[143] This is not a case of a need to rehabilitate or revive a company for a better realisation of the assets or business of Fintree but more a case where Liew no longer takes instruction from Loh and so 'damage control' has to be put in place and none faster than to convince the court of an urgent need to have an IJM appointed.

[144] Taking control of Fintree was the strategy Loh employed to fight his shareholders' disputes with the majority shareholders for Liew seems to be admitting to the accusations and claims of breach of fiduciary duties, breach of confidential information and conspiracy to injure the business of the PNL Group, much to the annoyance of Loh.

[145] The applicant, having cut his clothes must now wear it where the structuring of Fintree is concerned. Liew as the sole shareholder and director is perfectly capable of deciding what is best for himself and the company that he owns.

[146] It has come to this court's notice that Loh had later filed on 11 February 2022 a separate OS in the High Court in WA-24NCC-85–02 of 2022 against Liew and Fintree, asking for a declaration that he is the beneficial owner of all the shares in Fintree and for an order from the High Court for Liew to transfer all the shares in Fintree to Loh.

[147] What is latent is now patent; Loh had not disclosed this to the High Court in his JM OS and the ex parte application. Either it was a case of selective amnesia or a strategic suppression of facts which the High Court would not consider in his favour if disclosed. It is a case where Loh is asking for the court's assistance to protect his interest as a creditor when his real intention goes far deeper in that he was trying to wrest control of Fintree in a shareholders' dispute arising out of his disputes with the majority shareholders in the PNL Group.

[148] What has become obvious from what was sought to be obfuscated was that Loh, the applicant, was himself the alter ego of his company Fintree. In reality he is owing money to himself and seeking the court's help in appointing an IJM to help him recover from himself what is owing to him! It is a conflation of identities, obscuring the obvious and creating in the process an oxymoron. It is a case of 'I owe money to myself and I need the court to appoint a professional and independent JM to help me recover my debt and at the same time ensure my continuing survival and more than that, my success!'.

[149] Loh had to do that in stages for if he had disclosed the fact of his beneficial ownership of all the shares in Fintree, he would in effect be asking the High Court to appoint an IJM over Fintree which is owned by him! He is then the shadow director and its sole shareholder in reality! Such an action reeks of mala fide. No wonder his interest manifested is more than just that of a creditor but one who is intentionally focused on ensuring the survival and eventual success of Fintree!

[150] This court is not perturbed that in setting aside the JM order then it would be going against the wishes of the creditors who had approved the statement of proposal by 84.49%. That is in fact misleading and under the Companies (Corporate Rescue Mechanism) Rules 2018 a creditor is not entitled to vote in respect of a contingent debt:

> Creditors not entitled to vote in certain cases
>
> (1) A creditor of a company under judicial management shall not be entitled to vote in respect of —
>
> (a) any unliquidated or contingent debt; ...

[151] The rescue mechanism of judicial management is not to give extra ammunition to a shareholder and parties aligned in a shareholders' dispute to continue the shareholders' fight in a separate company, ostensibly set up to compete with the PNL Group when incriminating documents containing confidential information of the PNL Group had been seized in premises of Fintree and Liew.

[152] In fact, the substantial costs of and efforts in paying a JM to convene the creditor's meeting, setting aside the consent judgments, paying the salaries of Fintree's employees and other expenditure, already to the tune of RM450,000 in a short span cannot be justified when these are creditors who could well take care of their own interests in recovering their debts if they could prove that it is both due and owing to them.

[153] Even if it be true that Liew has the intention to stop business and close shop or to dispose of his shares to the PNL Group, that is a choice that he is at liberty to decide and the creditors would still have the right to sue Fintree and recover.

[154] As for Loh's allegation that Liew and the PNL Group had unlawfully caused Fintree to enter into a consent judgment, that is a matter to be decided by Liew for he is in the best position to decide for himself, with the wealth of experience gained while he was working as the most senior and longest serving staff of the PNL Group. The causes of action by the PNL Group against Liew and Fintree in Suit 623 include the following:

A (a) unlawfully conspiring to injure the PNL Group by misappropriating, stealing and converting confidential information of the PNL Group and their clients; and

(b) having abused and misused the confidential information of the PNL Group's clients for their personal benefit and profit.

B

[155] The High Court in Suit 623 granted an ex parte APO against Fintree and Liew on 7 January 2021 and subsequently amended the ex parte APO on 8 January 2021. On 13 January 2021 and 14 January 2021, the PNL Group executed the amended APO at Fintree's business premise.

C

[156] On 18 January 2021, Loh then filed the JM OS and the next day he moved the court for an ex parte IJM order. The applicant Loh too umbrage that one day later on 19 January 2021, Liew caused the solicitors acting on behalf of himself and Fintree in Suit 623, Messrs Desmond Ho & Associates to record the said consent judgment against Fintree.

D

[157] As Liew is the sole-shareholder and director of Fintree, he was at liberty to change solicitors with respect to the conduct and defence of Suit 623 and indications are that the previous solicitors acting for him and Fintree had been nominated by Loh and Liew did not feel free and comfortable with the said solicitors for his interest and that of Fintree is concerned.

E

[158] Whilst Loh wanted to read some unholy haste and to deduce unfavourable conduct on the part of Liew, we think what is more disturbing is the unholy haste with which Loh proceeded to file the JM OS and to move the court ex parte for the appointment of an IJM when as it is there was no urgency of his debt not being paid, a debt that is at best payable only when Fintree has been able to generate a positive cash flow and with this revelation, it became known that Loh was behind the scene, funding the initial start-up and business of Liew and Fintree.

F

G

[159] His concern and that of the other supporting creditor Vanessa cannot be that of a pure and plain creditor, but rather that of persons who have a personal and peculiar interest in the continuing success of Fintree because indirectly a proxy war is being fought over Fintree as a continuing battle in the saga of the shareholders' dispute and Loh's ensuing battle with the majority shareholders in Paul and Nicholas.

H

I

[160] Already there are a couple of suits pending before the High Court as follows:

(a) Kuala Lumpur High Court OS No WA-24NCC-154–03 of 2021 filed in March 2021 by Loh against Paul, Nicholas and PNL Trading for leave

to commence a derivative action in the name of PNL Trading to recover an alleged sum of RM3,495,000 for the advances made by PNL Trading to Tian An Trading;

(b) Kuala Lumpur OS No WA-24NCC-228–05 of 2021 filed in May 2021 by Loh against Paul, Nicholas, Tian An Trading and BDO Governance Advisory Sdn Bhd ('BDO Governance') in an oppression action under s 346 of the CA 2016 seeking, inter alia, to set aside the resolution to appoint solicitors to commence Suit 623 against Liew and Fintree;

(c) Kuala Lumpur OS No 24NCC-245–05 of 2021 filed in May 2021 by Loh against Paul, Nicholas, PNL Business Services and BDO Governance being another oppression action;

(d) Kuala Lumpur OS No WA-24NCC-246–05 of 2021 filed in May 2021 by Loh against Paul, Nicholas, PNL Capital and BDO Governance being another oppression action; and

(e) Kuala Lumpur OS No WA-24NCC-247–05 of 2021 filed in May 2021 by Loh against Paul. Nicholas, Tian An Trading and BDO Governance being another oppression action.

[161] As we had stated, Loh must alert the High Court in JM OS, from which these appeals emanated, that there are already various derivative and oppression actions filed by him even before the High Court decided on 8 June 2021 on the granting of the JMO after hearing both sides inter partes. The decision one way or the other is not as important as the motive and intent in leveraging on a JMO for a collateral purpose in fighting shareholders' disputes that have spawned many actions and suits. For completeness all the above actions by Loh were dismissed by the High Court.

[162] If the complaint of Vanessa is that her own clients' confidential information had been compromised, then it is for her to intervene in Suit 623 and obtain the necessary reliefs rather than support the applicant Loh and to vote on the contingent liability which is prohibited under r 30 of the Companies (Corporate Rescue Mechanism) Rules 2018.

[163] Likewise, her concern that Fintree's servers, laptops, handphones belonging to certain employees, hard drives, USB drives, accounting software, human resource software, books, accounting records, would then be retained by the PNL Group for an inordinate period, may also be similarly addressed. If Vanessa is concerned that the confidential information of her clients had been wrongly detained and with it the danger of it being misused, she has her remedy in law.

A **[164]** Perhaps she is more than hopeful that the JM nominated by the applicant Loh would be on the same page with her to protect her interest.

[165] Our understanding of the APO is that it does not prevent Fintree from carrying on its legitimate interest without the use of the confidential
B information from the PNL Group. The APO does not compel Fintree to stop its business.

[166] The fact that Loh as one of the directors of the PNL Group did not agree to the consent judgment being recorded against Fintree is irrelevant in the
C light of the alleged role of Loh in the setting up of Fintree and in any event the board of the PNL Group is entitled to make decisions by way of a majority of the directors deciding. The very nature of an APO is such that the offender must not get wind of the APO application being made.

D

[167] If such an action is oppressive Loh as a director and shareholder would always have the option of applying for leave of the High Court to commence a derivative action against the PNL Group or to proceed with an oppression OS which he did as narrated above and failed.

E

[168] A JMO is ill-suited to assist parties in a shareholders' dispute to resolve their differences and to protect their so-called interests when the effect of a JMO is harnessed and indeed hijacked for a collateral purpose in fighting what is essentially a shareholders' dispute more properly resolved through a
F derivative action or an oppression action.

DECISION

[169] We therefore found merits in all the four appeals. There was no inability
G to pay debts by the Fintree or a genuine fear of such an inability to pay. No creditors have ever demanded for their debts to be paid. There is no fear of insolvency of Fintree but rather a case where the applicant Loh was seeking to save Fintree which he had later asserted as belonging to him.

H **[170]** The process of the court and in this case its assistance with respect to the appointment of a JM should not be abused to fight a shareholders' battle. The trigger point was the fact of Liew not taking instructions from Loh. That is for Loh to find a remedy elsewhere whether it be in a declaration that the shares in Fintree are held in trust for him and an order for his removal for breach of trust.

I

[171] In the meanwhile, he has painted the picture of himself as a creditor and that must be viewed against the probabilities of the case where his concerns appear to be more than that of a mere creditor. Indeed, his concern ultimately is that Fintree that he has invested in cannot afford to fail but rather that its

survival must be ensured in his wider battle with the majority shareholders as reflected in his own inability to restrain further derivative and oppression actions filed against the majority shareholders and the PNL Group.

[172] The learned JC had erred in exercising his discretion in appointing a JM over Fintree when the circumstances do not justify it and more so when the applicant Loh had an overriding interest which is more than that of a mere creditor.

[173] The four appeals were allowed and the orders of the High Court in appointing an IJM and subsequently a JM in the JMO were set aside. With that, all decisions of the IJM and JM were also set aside unless ratified by the Fintree, especially with respect to statutory payments under the law.

[174] We order costs of RM5,000 for each appeal to the appellants subject to allocator to be borne jointly and severally by the respondents.

Appeals allowed; judicial management order, appointment of the JM and all decisions made by the JM set aside.

Reported by Ashok Kumar